STATE OF MICHIGAN

COURT OF APPEALS

BELINDA M. ANDERSON,

Plaintiff-Appellee,

v

ROSALIE M. KOLINSKE and RICHARD KOLINSKE,

Defendants-Appellants.

UNPUBLISHED
March 30, 2006

No. 257386
Emmet Circuit Court
LC No. 03-007883-CH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendants Rosalie Kolinske and her son Richard Kolinske appeal as of right the trial court order quieting title in a disputed strip of land in favor of plaintiff Belinda Anderson. We affirm.

Defendant Rosalie Kolinske and her late husband purchased the property known as 410 Myrtle Street in 1961. Plaintiff purchased an adjacent parcel of property known as 1301 Howard Street in 1999 and had a survey performed in 2002. Defendants disagreed with the survey results and installed a snow fence on the disputed portion of land. Plaintiff attempted to have another survey performed in 2003, but defendants thwarted that attempt by refusing to move their vehicle which was parked in a location that prevented the surveyor from properly staking the land.

Based on the survey results, plaintiff sued defendants to quiet title in an 18 inch by 132 foot portion of land running north and south along the east side of her property and the west side of defendants' property. The disputed strip of land ran along defendants' driveway and purportedly included the eastern side of plaintiff's garage. Plaintiff asserted that the true boundary line dividing the property was adjacent to the western edge of a brick retaining wall that divides the parties' property. Plaintiff also requested injunctive relief to compel defendants to remove the snow fence and to allow her access to the disputed area. Defendants asserted that they were the true owners of the disputed strip of land under the doctrines of acquiescence and adverse possession. Following a bench trial at which both parties proceeded in propria persona, the trial court entered an order quieting title in the disputed strip of land in favor of plaintiff, concluding that defendants failed to establish their claim of boundary by acquiescence and adverse possession.

Defendants first argue that the trial court erred in quieting title in the disputed strip of land in favor of plaintiff. We disagree. We review de novo actions to quiet title, because they are equitable in nature. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). We review for clear error the trial court's findings of fact in a bench trial. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Alan Custom*, *supra* at 512. We give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

Here, the trial court found that plaintiff's survey accurately described and established the boundary between the two parcels of land and that defendants failed to establish their claims of boundary by acquiescence and adverse possession.[1] The trial court noted that defendants' claim of acquiescence rested primarily on the existence of a six-inch wide brick retaining wall that was installed and paid for by defendant Rosalie's late husband. Defendants introduced evidence asserting that plaintiff's predecessor in interest agreed that the wall marked the boundary between the two parcels of land. According to the survey commissioned by plaintiff, the wall is on the line between the two parcels. Thus, the trial court found that the existence of the wall and the alleged acquiescence between defendants and plaintiff's predecessor in interest did not establish a boundary line different from the true boundary line established by plaintiff's survey.

The trial court noted that defendants introduced evidence that they considered the entire wall to be on their property, but found that no evidence was introduced that any of plaintiff's predecessors in interest acquiesced in defendants' ownership of the entire wall. The trial court also noted that defendants introduced evidence that a maple tree was located on the north end of their property and that according to the survey, the boundary line runs through the middle of the 36-inch wide maple tree. However, the trial court found that no evidence was introduced that plaintiff or any of her predecessors in interest acquiesced in the tree being entirely on defendants' property or agreed that the west side of the tree marked the boundary. Further, the trial court took judicial notice that the diameter of the tree increased during the time defendants owned their property, and found that there was no legal support for the proposition that the growth of the tree on the boundary line would expand defendants' land ownership.

The trial court noted that defendants introduced evidence that the south end of plaintiff's garage encroached on their property, but found that the survey showed the garage to be entirely on plaintiff's land. The trial court found that the snow fence installed by defendants encroached approximately two feet onto plaintiff's property, and that the only evidence supporting defendants' claim to the property up to the snow fence was that defendant Rosalie's late husband allegedly filled the southern portion of his lot up to the approximate line of the snow fence. The trial court found no evidence indicating precisely when the fill was installed or any agreement

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[1] Defendants do not dispute the trial court's finding that they failed to establish their claim of boundary by adverse possession.

between plaintiff's predecessors in interest to the effect that the fill marked a boundary line between the adjoining parcels.

The trial court noted that it visited the property and observed that a small difference in elevation did not delineate a clear boundary line between the two parcels. The trial court noted that defendants introduced evidence that defendant Rosalie's late husband planted a cedar tree on the boundary line at the south end of defendants' property, but found that the cedar tree was actually within a few inches of the true boundary established by plaintiff's survey, and that it was much closer to the survey boundary than defendants' claimed boundary as claimed by the placement of the snow fence. Accordingly, the trial court found that defendants failed to establish a boundary by acquiescence.

A claim of acquiescence to a boundary line requires a showing by a preponderance of the evidence that the parties acquiesced in the line and treated it as the boundary for the 15 year statutory period, regardless of whether there was a bona fide controversy regarding the boundary. *Walters v Snyder*, 225 Mich App 219, 223-224; 570 NW2d 301 (1997); MCL 600.5801(4). A boundary line treated and acquiesced in as the true line for at least 15 years ought not be disturbed upon a new survey. *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956). This Court has explained:

> The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [*Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).]

We agree with the trial court that defendants did not acquire title in the disputed strip of land by acquiescence. We find that the trial court did not clearly err in its factual determination that defendants failed to prove that plaintiff or any of her predecessors in interest believed the retaining wall or maple tree to be entirely on defendants' property or acquiesced in the edge of the maple tree constituting the northern boundary between the two parcels. Likewise, we find that the trial court did not clearly err in its factual determination that defendants failed to prove that plaintiff or any of her predecessors in interest believed the fill line to constitute the southern boundary demarcation between the two parcels.

We recognize that defendants presented evidence that a cedar tree was planted on defendants' property just within the southwestern corner of defendants' parcel, including testimony from a defense witness that it was common knowledge between plaintiff's predecessors in interest and defendants that the cedar tree constituted the boundary line between the two parcels. However, the trial court apparently found the testimony of the witness

incredible where he also testified that plaintiff's garage was built at a slight angle so that the southeastern corner encroached on defendants' property, when the survey clearly indicated that it was the northeastern corner that was closest to defendants' property. Moreover, we must defer to the trial court's superior ability to judge witness credibility. *Glen Lake-Crystal River*, *supra* at 531. We find that the trial court did not clearly err in its factual determination that the cedar tree was within a few inches of the true boundary as established by plaintiff's survey and that the location of the tree is actually closer to the survey boundary than to defendants' claimed boundary, especially in light of the fact that the issue regarding the placement of the tree concerns only a matter of inches between the proposed lot lines. Accordingly, the trial court properly determined that defendants did not own the disputed strip of property under the doctrine of acquiescence.

Defendants next argue that the trial court committed reversible error in only allowing one of them to answer questions from the court and in only allowing one of them to examine witnesses. We disagree. The conduct of a trial is within the control of the presiding judge and does not result in error warranting reversal unless there is some proof of prejudice. *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992). The record here does not clearly show that the trial court directed defendants that only one could speak for both of them. Rather, the trial court suggested that as a possible approach, but the nature of its comments also would have allowed defendants to suggest otherwise, which they failed to do. We find that defendants' actions at trial constituted a forfeiture of this issue. See *Stein v Braun Engineering*, 245 Mich App 149, 154; 626 NW2d 907 (2001).

To obtain relief on this forfeited issue, defendants must demonstrate plain error that affected their substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); MRE 103(d). Defendants were allowed to have their say, present their witnesses, cross-examine plaintiff's witnesses, and make arguments, all without any complaint about the procedure. Further, the trial court allowed one of the defendants to speak when he so desired and allowed the other defendant to speak when she so desired. Finally, any prejudice that might have otherwise resulted to defendants was mitigated by the fact that this was a bench trial. See, e.g., *In re Forfeiture of $19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). Defendants have failed to demonstrate error that affected their substantial rights.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood